

**IN THE HIGH COURT OF FIJI**  
**WESTERN DIVISION**  
**AT LAUTOKA**

**[CIVIL JURISDICTION]**

**Civil Action No. HBC 296 of 2021**

**BETWEEN** : **WESTBUS (FIJI) LIMITED** a limited liability company having its registered office at Nadi Back Road, Nadi, Fiji  
**First Plaintiff**

**AND** : **VIJENDAR KUMAR** of 10 Ram Deo Street, Martintar, Nadi, Managing Director.  
**Second Plaintiff**

**AND** : **BSP FINANCE (FIJI) PTE LIMITED** a limited liability company having its registered office at Level 12, BSP Suva Central Building, Corner of Renwick Road and Pratt Street, Suva.  
**Defendant**

Before : Master U.L. Mohamed Azhar

Counsels : Ms. Radhia for the plaintiff  
Ms. S. Devan for the defendant

Date of Ruling : 31.03.2023

**RULING**

01. The first plaintiff obtained commercial purpose loan facility from the defendant on several conditions including the security by way of first mortgage over Certificate of Title No. 16233 being Lot 16 Deposited Plan No. 4068 known as "Cawa" (part of) situated in the District of Nadi belongs to the second plaintiff. The special condition was that, the said mortgage to be discharged in exchange of securitization over four Brand New Hino 61 seater buses upon arrival. The letter of offer by the defendant contains all the conditions and it is marked as "Exhibit B" and annexed with the affidavit sworn by the second plaintiff in support of the Originating Summons and the Ex-parte Notice of Motion for certain injunctions.

02. However, the securitization of buses did not eventuate and the mortgage over the above mentioned property continued undischarged. The first named plaintiff defaulted in paying the loan amount. The Default Notice dated 08.10.2021 for sum of \$ 127,500.72 was served on the second plaintiff by the solicitors for the defendant. The second plaintiff was given 30 days to clear the above amount. In the meantime, the defendant published the notice in a daily for mortgagee's sale of the same property. The property was valued at a sum of \$ 3.8 million in year 2019.
03. The plaintiff then filed the Originating Summons and sought primarily the following orders on the defendant.
  - a. That the defendant forthwith discharge mortgage registered upon Certificate of Title No. 16233 known as "Cawa" (part of), having an area of thirty two perches, being Lot 16 on Deposited Plan No. 4068 and situated in the District of Nadi and in the Island of Viti Levu, and
  - b. That the defendant forthwith securitize four (4) buses having Vehicle Registration Nos. JF 905, JF 906, JF 907 and JF 908.
04. The plaintiff also sought an injunction restraining the defendant from proceeding with the mortgagee's sale of the said property. At hearing of the ex-parte motion for injunction, the plaintiff agreed to deposit a sum of \$ 263,301.01 as the security of the outstanding amount of \$ 127,500.72 mentioned in the Default Notice and to tender the insurance policies of the of the all four buses intended to be securitized. Having considered the circumstances of the case and the undertaking of the plaintiff to deposit the outstanding amount, the court granted interim injunction restraining the defendant form proceeding with the mortgagee's sale.
05. The defendant then filed the current summons and sought to dissolve and or set aside the interim injunction granted against it and strike out the Originating Summons on the grounds that, it does not comply with the Order 5 rule 4 and the Order 7 rule 3; it does not disclose a reasonable cause of action and it is otherwise an abuse of the process of the court. At hearing the counsels submitted on the principles that govern granting injunctive reliefs and on the alleged irregularity of the Originating Summons.
06. Granting of interlocutory injunction is a matter of discretion. The object of the interlocutory injunctions is to protect the plaintiff against grievance by violation of his right for which he could not be adequately compensated in damages recoverable in the action if he obtains the judgment in his favour at the end of the trial. However, the plaintiff's need for protection must be weighed against the need of protection of the defendant against the harm that may be caused to him from being prevented from exercising his right if he obtains judgment in his favour. The court should determine

where the balance of convenience lies. (Lord Diplock in American Cyanamid Co. v. Ethicon Ltd [1975] AC 396 at page 406). Accordingly, the court has to consider (i) Whether there is a serious question to be tried; (ii) Whether damages would be adequate remedy; and (iii) Whether balance of convenience favor granting or refusing Interlocutory Injunction.

07. Justice Laddie having considered number of cases including American Cyanamid (supra) concluded in Series 5 Software v. Clarke [1996] 1 All ER 853 at page 865 as follows:

“...it appears to me that, in deciding whether to grant interlocutory relief, the court should bear the following matters in mind. (1) The grant of an interim injunction is a matter of discretion and depends on all the facts of the case. (2) There are no fixed rules as to when an injunction should or should not be granted. The relief must be kept flexible. (3) Because of the practice adopted on the hearing of applications for interim relief, the court should rarely attempt to resolve complex issues of fact or law. (4) Major factors the court can bear in mind are (a) the extent to which damages are likely to be an adequate remedy for each party and the ability of the other party to pay, (b) the balance of convenience, (c) the maintenance of the status quo, and (d) any clear view the court may reach as to the relative strength of the parties’ cases.”

08. The defendant opposing the interim injunction granted by this court stated that, the first plaintiff obtained three different loan facilities, namely Loan Account No. L10411, L10824 and L11552. The plaintiff defaulted in all three accounts and the defendant should be allowed to proceed with the Mortgagee’s Sale to recover the total sum due under all three loan accounts. On the other hand, the second plaintiff stated clearly in his affidavit in opposition that, he proceeded to settle the total amount in Loan Account No. L11552, however, the defendant refused to accept the same. Annexing a letter issued by the Reserve Bank of Fiji, the second plaintiff stated that, the Reserve Bank too advised that, the second defendant can redeem the mortgage by settling the full amount of \$ 785.452.00 which include total outstanding amount under that third loan account and other charges thereunder.
09. Even though the first plaintiff obtained three loan facilities from the defendant, the subject property was mortgaged by the second plaintiff only to secure the loan obtained under the third loan facility under the Loan Account No. L11552. The subject property is not a security for the other two loans which were obtained prior to the third loan facility. The mortgagor has the equitable right of redemption recognized by the equity in all cases

**(Salt v Marquess of Northampton** [1892] AC 1). The first defendant is ready to redeem the same by paying the full amount under the third loan account secured by the subject property. However, the defendant denied it. The question is whether the defendant (mortgagee) can refuse the exercise of equitable right of redemption by the mortgagor on the ground that the mortgagor owes money to the mortgagee on a different loan account which is not secured by the subject property? This question to be determined by the court at the hearing of the originating summons. Thus there is a serious question to be tried in this matter.

10. Furthermore, the defendant in the offer letter dated 02.02.2017 for the third loan agreed to discharge the mortgage of the subject property in exchange of securitization over four brand new Hino 61 Seater-buses on arrival. The summons seeks an order on the defendant compelling him to discharge the mortgage and securitize the said buses. However, the defendant took up the position that, the first plaintiff imported four 31 Seater Buses instead of 61 Seater Buses. The defendant also argued that, the default occurred even before the arrival of buses and in any event the plaintiff breached the offer by importing the 31 Seater Buses instead 61 Seater Buses. However, the defendant allowed the first plaintiff to continue with the facility. The questions are whether defendant waived the alleged breach by allowing the defendant to continue with the facility and whether the securitization of the buses could still be done and the mortgage could be discharged. These are the other questions to be determined by the court in this Originating Summons.
11. The subject property was valued in year 2019 for \$ 3.8 million. The current value must be higher than the value in year 2019. On the other hand, the total amount due under third loan account is \$ 785.452.00 as agreed by the defendant. Even all three loan accounts taken together, the total outstanding is very much less than the value of the subject property. Therefore, if the defendant is allowed to go ahead with the mortgagee's sale, the first defendant will suffer an irreparable loss and no remedy would be adequate for him, because he will lose the subject property.
12. Lord Diplock in **American Cyanamid Co. v. Ethicon Ltd** [1975] AC 396 at page 406 as follows:

when an application for an interlocutory injunction to restrain a defendant from doing acts alleged to be in violation of the plaintiff's legal right is made upon contested facts, the decision whether or not to grant an interlocutory injunction has to be taken at a time when *ex hypothesi* the existence of the right or the violation of it, or both, is uncertain and will remain uncertain until final judgment is given in the

action. It was to mitigate the risk of injustice to the plaintiff during the period before that uncertainty could be resolved that the practice arose of granting him relief by way of interlocutory injunction; but since the middle of the nineteenth century this has been made subject to his undertaking to pay damages to the defendant for any loss sustained by reason of the injunction if it should be held at the trial that the plaintiff had not been entitled to restrain the defendant from doing what he was threatening to do. The object of the interlocutory injunction is to protect the plaintiff against injury by violation of his right for which he could not be adequately compensated in damages recoverable in the action if the uncertainty were resolved in his favour at the trial; but the plaintiff's need for such protection must be weighed against the corresponding need of the defendant to be protected against injury resulting from his having been prevented from exercising his own legal rights for which he could not be adequately compensated under the plaintiff's undertaking in damages if the uncertainty were resolved in the defendant's favour at the trial. The Court must weigh one need against another and determine where "the balance of convenience" lies.

13. The question to be determined, as mentioned above, is whether the defendant can prevent the second plaintiff from exercising his equitable right of redemption on the ground that he owes money on other two separate loan accounts. If this question is determined in favour of the second plaintiff he will have to pay only \$ 785.452.00 to redeem the subject property and he is still ready for the same. The second plaintiff will not lose his valuable property if the injunction is granted, and the defendant also will get what it is entitled for under the third loan agreement. If the question is determined in favour of the defendant, it can still go for mortgagee's sale and recover all due under all three accounts. However, if the injunction is not granted and the court finally determines the question in favour of the second plaintiff, he will lose the subject property. Accordingly, when weighing the need for protection of the second plaintiff against the need of the defendant to secure its money, the balance of convenience lies in favour the second plaintiff.
14. For the above reasons, the interim order granted on 23.12.2021 should be extended till determination of the originating summons in this matter. The defendant also took up the position that, the originating summons is irregular as it did not comply with the Order 7 of the High Court Rules which governs the Originating Summons.
15. The Order 7 of the High Court Rules deals with the general provisions of the Originating Summons. In the olden days, the civil suits were commenced by a bill in the Court of Chancery and it gave many opportunities for delay and expense. In order to avoid this

delay and expense the system was devised of a summons originating proceedings in chambers for the purpose of quick determination of simple points. **Lord Esther, M.R.** in **Re Holloway, Ex P.Pallister**, (1894) 2 QB 163 C.A briefed the genesis of this procedure at page 166 that:

It was found that the old mode of commencing a suit in the Court of Chancery by a bill gave many opportunities for delay and expense, and in order to avoid this delay and expense the system was devised of a summons originating proceedings in chambers, which in the course of time came to be called an “originating summons.” This procedure was invented for the purpose of quickly determining simple points. When these “originating summonses” had been used for some years in the Court of Chancery and the Chancery Division, it was decided to extend them to the other Divisions of the High Court

16. As a result, the Order 7 rule 3(1) requires a person who brings an originating summons to briefly state the question to be determined by the court and the grounds for the same. The Originating Summons in this case does not clearly state the question to be determined and the grounds, though it can be understood from the contents. The question is whether it should be dismissed for this irregularity?
17. In **Marsh v. Marsh** (1945) A.C. 271 the Judicial Committee of Privy Council considered some of those authorities and concluded with the test applicable in case of irregularity. The Privy Council unanimously held at page 284 that:

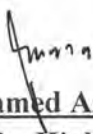
A considerable number of cases were cited to their Lordships on the question as to what irregularities will render a judgment or order void or only voidable. *Anlaby v. Prcetorious* (20 QB 764) and *Smurthwaite v. Hannay* (1894 AC 494) are leading examples of the former, while *Fry v. Moore* (23 QB 395) may be said to illustrate the latter..... No court has ever attempted to lay down a decisive test for distinguishing between the two classes of irregularities, nor will their Lordships attempt to do so here, beyond saying that **one test that may be applied is to inquire whether the irregularity has caused a failure of natural justice.** (Emphasis added).

18. The Privy Council again relied on the above decision in **Austin v. Hart** (1983) 2 ALL E.R. 341 and stated that:

'The modern approach is to treat an irregularity as a nullifying factor only if it causes substantial injustice: see: Marsh v. Marsh (1945) A.C. 271 at 284.'

19. It does not seem that, the alleged irregularity in this matter would have caused substantial injustice to the defendant. Accordingly, it fit and proper to allow the plaintiffs to amend the summons so as to clearly indicate the question to be determined between the parties.
20. In result, I make the following orders:
  - a. The summons filed by the defendant to set aside the interim injunction is dismissed,
  - b. The injunction granted on 23.12.21 is made permanent and shall be in force till determination of this matter.
  - c. The Originating Summons filed by plaintiff to be amended to clearly plead the issues determined by the court
  - d. The parties to bear the costs.
21. The above order for permanent injunction is granted on the condition that, the second plaintiff should, within 14 days from today, deposit a sum of \$ 522,150.99 the balance after deducting the amount already deposited on 23.12.2021 from the sum of \$ 785,452.00 due under the third loan account, to the Trust Account of High Court. This condition will serve to protect the need of the defendant if the questions are determined either way.



  
U. L. Mohamed Azhar  
Master of the High Court

At Lautoka  
31.03.2023